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The Mediated Settlement: Is It Always Just About the Money? Rarely!

Steven L. Schwartz*

A STORY:

A 45-year old man was employed as a tree trimmer. One bright, sunny day he was working high up in big oak tree when his safety latch failed and he fell some 40 feet to the ground. He broke numerous bones and suffered multiple contusions all over his body. He was hospitalized for two months followed by one year of physical rehabilitation. The man, big and burly prior to the accident, eventually mended and was pronounced fit to resume his pre-accident life.

To no one's surprise, he retained a lawyer who filed an action against the manufacturer of the latch. The case went through what most lawyers would characterize as a typical litigation scenario — discovery, motions, settlement feelers, demanding lawyer letters, and court delays for trial. About one year into the case, the two very experienced counsel agreed to recommend to their respective clients that they try mediation. The Plaintiff wanted to bring closure to his litigation experience and his lawyer recognized certain proof problems; and the Defendant (insured) desired to minimize its risk of an overly sympathetic jury.

The mediation was begun and continued throughout the entire day. The Plaintiff was present with his counsel. However, the Plaintiff seemed detached and was vague as to the amount of money that would satisfy his needs — and money was the sole focus of the settlement effort. Although the female Defendant insurance adjuster had substantially improved her offer as the day progressed, Plaintiff continued to be non-communicative about his magic number and his lawyer grew increasingly frustrated over his client's seeming obstinacy.

Finally, in a private caucus with the Plaintiff only, the mediator inquired whether there was something bothering the Plaintiff that he had not expressed and seemed to be impeding his ability to "let go" of the lawsuit. After several starts and stops, the Plaintiff finally confided certain previously undisclosed facts unknown even to his lawyer. The Plaintiff had been a bachelor his entire life. A month or so before his fall from the tree, he had fallen in love for the first time with the woman of his dreams. They had enjoyed mutually fulfilling intimate relations until the accident. To all outward appearances, he had fully

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recovered from the accident. However, the fall had in some way impaired his ability to be intimate with his companion — this Paul Bunyan of a man had become impotent. The result was that his companion, while compassionate to his condition, was drifting out of their once love-story like relationship. The Plaintiff had revealed this shocking circumstance to no one, not his doctors, his lawyer not anyone.

The problem in the mediation became clear: There was no amount of money that would restore his “manhood” nor bring his companion back. How, then, could the case be settled on a strictly monetary basis? The case was eventually resolved at a compromise figure. But this was possible only after the Plaintiff had reached a catharsis by revealing his devastating secret to the mediator and having a private caucus with the female adjuster who was willing to lend a listening and sympathetic ear as her husband had gone through a similar personal trauma as a result of an accident. The lesson: While money was the medium by which the case was dismissed, the underlying problem inhibiting settlement had nothing to do with money.

IS IT EVER ONLY ABOUT THE MONEY?

No!! If it were, then those client first meetings would be over with in a matter of minutes — the amount having been determined, there would be no need for the lengthy, detailed and often emotional explanation that attends virtually every client interview about his/her problem. Were it possible to simply input all of the case data into a computer program and come up with a number that everyone accepted, then “yes” it would be just about the money.

With every client there comes a story, however. The story may be about a tree-trimming Plaintiff; it may be about a broken computer design and development contract; it may be about “Uncle Fred’s” estate plan that the family is now contesting; it may be about the high school principal transferred to another post of seeming lesser importance; it might be about the amputated leg that started out as a routine scope examination; it may be about the failed corporate merger or a partnership breakup; it might be about literally any human or commercial experience gone awry.

With so many possibilities for conflict all in need of resolution, are there any common denominators, any repetitive experiences, some basic principles that mediation as a dispute resolution process has revealed to exist? As a simple truth, money has become the method by which our legal system resolves conflict. As a corollary truth, every conflict has a story and until that story is told and heard, even money cannot solve the problem.

In mediator parlance, the telling of the story and it being heard is sometimes called “venting”. In our legal system, it is the lawyer who typically tells the story and not the client. In lawyer parlance, this is called advocacy. In fact, because the lawyer becomes responsible for telling the story, one of the scariest

experiences for any lawyer is when his client is left alone on the witness stand to personally tell his/her story protected only by the lawyer's ability to prepare the client for and object to the opposing counsel's searing cross examination questions.

Most often, because only a very few cases ever get to trial, the client never actually gets to tell his/her own story. Instead, lawyers advocate their client's story, while the client sits nearby and listens. The client experience, while one of relief or even pride over his/her lawyer's presentation, is also often accompanied by frustration over not having the opportunity to personally tell the story. The story has been told yet no one but the client experienced the situation as it happened. Settlement means that the story is no longer important and now it is time to end the debate over who was right and who was wrong and move on. For the client who has not told his/her story, whether plaintiff or defendant, this frequently creates an internal struggle that interferes with the client's ability to consider settlement at any price!

TO REACH SETTLEMENT — THE CLIENT MUST TELL THE STORY:

In our litigation framework for resolving disputes, the retention of counsel is designed to shield the client from vulnerability to the other side's attacks. At the same time, the client becomes insulated from accountability for his/her role in the conflict. The lawyer becomes the producer, director and star in the litigation play. Indeed, clients often report that they feel more like bystanders to rather than participants in managing their own dispute.

In the mediation framework, the underlying objective is to restore the client's central role in both participation and responsibility for resolution of the conflict. A fundamental method for fulfilling this objective is to permit the client to tell the story and contribute directly to proposing and deciding upon options for settlement. If the client is not involved in this way, whatever is going on is not mediation but some other process.

Getting to "yes" in any mediated dispute requires, therefore, that client and counsel understand what may inhibit the client's direct participation in the process. It also requires identification of what the client's real needs and interests are. Only by understanding what the client really believes is important can her/his counsel chart a course at mediation that can realistically result in settlement.

Ironically, telling the story sometimes means that the client tells his/her whole story only to a selected few but tells it nonetheless.

ANOTHER STORY:

The Doe family lost their 8 year-old daughter to what they believed to have been an oversight by physicians and a hospital in the course of rendering treatment for a serious illness. At mediation, the Mr. and Mrs. Doe accepted a monetary offer for their wrongful death claim that was lower than what their counsel believed was both reasonable and achievable. Their counsel had actively opposed acceptance of the settlement until he held a private caucus with his clients. Immediately, thereafter he changed his position and advised them to accept the offer. The mediator had not been present during this private meeting and was surprised at the Doe's and their lawyer's decision.

Some months later, the mediator and lawyer happened to meet at a social function. The lawyer opened the subject of his clients' settlement for their deceased daughter. He remarked that he had initially been against accepting the defendants' offer. However, during the private caucus, Mr. and Mrs. Doe revealed that their 6 year-old daughter had recently been diagnosed with serious illness. The family's doctors had advised that with the immediate implantation of a particular medical device through surgery, the younger daughter could grow up to lead a normal life. But without the device, her chances of survival were questionable. The family had limited insurance coverage and did not otherwise have the resources to fund this life-saving medical treatment. At it turned out, the defendants' settlement proposal was just sufficient to cover the complete cost of the procedure and follow up care.

The lawyer concluded this revealing story by saying that the family had decided that there was nothing that they could do for their deceased daughter, but there was a way to save their younger child — and that was to accept the defendants' proposal and thereby have the funds to pay for the necessary medical treatment.

What this story teaches us is that no matter how strong and compelling the facts or the law, parties either settle or don't settle for reasons "below the water line". No matter whether the conflict arises from a personal injury, a contract breach or a class action, the principle remains constant: Sometimes the untold story becomes a barrier to settlement and only by its revelation can parties move beyond the controversy to resolution as with the tree trimmer. Other times it is enough that the reason exists and remains undisclosed to anyone except the parties and their counsel but results in a settlement.

THE MEDIATOR'S ROLE IN HELPING THE STORY TO BE TOLD:

In the story of the tree trimmer, the plaintiff could only have reached a readiness to realistically assess his factual and legal position, listen to his lawyer's advice and meaningfully participate in the negotiation of a settlement by surmounting the barrier of his hidden angst. The mediator's role in this situation

was to help the party and his counsel identify what was barring the door to this readiness. By creating an environment in which the party felt safe in revealing his story without fear of ridicule or judgment, the mediator helped lawyer and client unbar the door, begin the personal healing and allow for settlement of the legal dispute.

In the Does' case, the mediation process gave them the opportunity to weigh the consequences of proceeding with what appeared to be a compelling legal case with their real needs and interests. The mediation process gave them permission to decide for themselves that saving the life of one child was more important than proving a point by means of a successful trial and potentially larger financial recovery that would not bring back their deceased daughter. Here, the mediator's role was to create an environment in which difficult choices could be made without guilt.

THE LAST STORY:

ABC Corporation decided to purchase a wholly owned division of XYZ Company. The transaction was a multi-million dollar deal and was negotiated by senior executives at both companies. The typical mountain of contractual documentation was signed and ABC went to work with the new division. Within 3 months of the acquisition, ABC uncovered a significant amount of previously undisclosed debt on the part of XYZ. By then, however, the division had experienced a significant downturn in business due to a Federal Regulatory audit of its manufacturing processes that disclosed unacceptable health risks and immediate shut-down of the offending processes.

During the interim, XYZ was sold to a conglomerate, MegaCorp, that in turn sold off all of the assets and basically dissolved XYZ. The executives at ABC who had negotiated and approved the division deal felt that something had to be done and authorized a suit against MegaCorp. Early on in the litigation discovery phase, ABC learned that MegaCorp had bought the assets and not the stock of the division and that MegaCorp's acquisition of the assets included a provision in which it disclaimed any responsibility for the division's liabilities. Upon learning of this factor, a mediation was agreed upon.

Preliminary to the first mediation session, the mediator met in confidential session with the ABC executives who had approved the division deal and authorized the lawsuit. It became apparent that these executives were very personally invested in the outcome of the lawsuit and mediation and were having difficulty separating their interests from those of the company. After much frank discussion in which the mediator assisted those present in examining who should attend the mediation, it was decided that a different set of ABC's execu-

tives would represent the company at the mediation. What the mediator had anticipated as being a potential barrier to resolving the lawsuit through mediation was removed once the story of personal interests was examined and ABC determined that different personnel should attend the mediation.

Difficult choices often must be faced even before the opposing parties sit down at the settlement table. Many times personalities, vested interests (whether disclosed or not) and the like show up as barriers to reaching a financially rationale resolution preventing the ability to address the substantive issues at all. In this case had the personnel not been changed, getting to the number may not have been possible.

IS IT JUST ABOUT THE MONEY:

Since our legal system of dispute resolution tends to remedy wrongs only by payment of money, most settlements will eventually involve negotiations over the amount to be paid and received. Yet, in both the theory and actual practice of mediation that has lead this writer to conclude that it is never just about the money.

Effective lawyer representation of clients in mediation requires a different kind of investigation and preparation than lawyers may be accustomed to conducting. Similarly, an effective mediator must be adept in identifying the clues that reveal the "below the water line" interests at work and which must be dealt with if resolution is to be achieved. In the absence of either consideration, patience may run short, posturing may replace openness to settlement options and impasse result in the mediation. To paraphrase Socrates, the father of the legal profession, if you want that check to be written, "know thy client as well as know thyself!"